First, AT&T suggests that foreign carriers could allocate a disproportionate share of return traffic to U.S. affiliates. As AT&T is forced to concede, however, such action would violate the Commission's policy prohibiting an affiliate from accepting more than its proportionate share of return traffic.[32/] AT&T's argument amounts to nothing more than "we think they will break the law and get away with it." This argument has little merit since the Commission's safeguards for TLD (and other foreign-affiliated carriers) already include an express condition on the Section 214 authorizations not to accept more than its proportionate share of return traffic.[33/] The Commission has promised that, if necessary to ensure compliance with these competitive safeguards, it "will initiate proceedings to revoke a carrier's Section 214 authorizations to operate in the U.S. market."[34/] An injured U.S. carrier could also be made whole through a complaint filed under Section 208.[35/]

The Commission should adopt its proposal to codify the proportionate return requirement for all carriers.[36/] As Sprint points out, the Commission's proposal to

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31/ (... continued)

order. Thus, AT&T's anecdote proves that the Commission's current procedures work by providing competing U.S. carriers with protection from competitive abuses and a forum for redress of any complaints.

32/ AT&T Comments at 15.

33/ TLD Acquisition Order, 8 FCC Rcd at 112 ("We specially condition [TLD's] authorizations on [TLD] accepting only its proportionate share of return traffic from any foreign carrier or administration with which it establishes an operating relationship.") (footnote omitted).

34/ In the Matter of Regulation of International Common Carrier Servs., 7 FCC Rcd 7331, 7335 (1992), modified, 8 FCC Rcd 452 (1993).

35/ Complaints against carriers, particularly AT&T, are commonplace. See, e.g., In the Matter of Public Serv. Enters. of Pennsylvania, Inc. v. AT&T Corp., Memorandum Opinion and Order, File No. E-93-091 (May 5, 1995) (finding AT&T had violated the Communications Act by refusing to provide service under an existing tariff).

36/ NPRM ¶ 91.

codify the proportionate return traffic requirement is the best way to handle this issue because AT&T and other U.S. carriers have the incentive and opportunity to command more than their proportionate share of return traffic. Indeed, while AT&T could not point to any evidence that any foreign-affiliated carrier has received more than its proportionate share or return traffic, Sprint cited evidence that AT&T has received more than its proportionate share of return traffic from some countries.[37/] All carriers will be adequately protected if the Commission codifies its proportionate return traffic policy.

Second, AT&T claims that a foreign carrier could discriminate against U.S. carriers in the provision of interconnections by relegating competing U.S. carriers to antiquated gateway switches and facilities while reserving its modern digital facilities for its U.S. affiliate.[38/] Once again, AT&T has been unable to point to any instance where such discrimination has occurred. This is not surprising since the Commission's safeguards prohibit foreign-affiliated carrier acceptance of any special concessions, which could include preferential facilities treatment.[39/] There is also an enormous practical obstacle to AT&T's imagined problem. Since AT&T supplies the majority of international traffic to virtually every foreign country, it would be difficult to pigeon-hole its traffic on antiquated facilities.

37/ Sprint Comments at 31 (citing Sprint's December 5, 1994 Reply in File No. ISP-95-002, App. A (showing over-allocations of return traffic to AT&T by several foreign carriers)). Sprint's showing that AT&T has received a disproportionate share of return traffic from other carriers puts to rest AT&T's assertion, AT&T Comments at 15-46, that distortions cannot be readily detected.

38/ AT&T Comments at 12.

39/ See TLD Acquisition Order, 8 FCC Rcd at 116 (TLD "shall not agree to accept special concessions directly or indirectly from any foreign carrier or administration with respect to traffic or revenue flows between the United States and any other country"); BT/MCI Order, 9 FCC Rcd 3960, 3967 (MCI agreed not to accept "'special concessions'"). Although it does not appear necessary, the Commission could explicitly prohibit foreign-affiliated carriers from accepting preferential interconnections.

This second concern of AT&T also amounts to little more than a theoretical horror story that a foreign-affiliated carrier would violate the condition in its Section 214 authorization in order to gain a momentary advantage over competing U.S. carriers. While there is always a theoretical possibility that any carrier may violate the Commission's rules, the FCC should not predicate adoption of the NPRM on AT&T's supposition that existing rules will not be followed. This is particularly true where there is no evidence that the rules have been violated, and where competing carriers could readily detect any possible violation.

Third, AT&T claims that a foreign carrier may have the opportunity to impose a "price squeeze" on rival U.S. carriers by maintaining above-cost accounting rates and funneling internal transfer payments to the foreign-affiliated carrier. AT&T asserts that the U.S. affiliate would then be able to ignore the net settlements cost in pricing its services to this country to gain a competitive advantage.[40/] There are a number of problems with this argument. First, the compensating internal transfers would only make economic sense if the foreign carrier owned 100% of the U.S. affiliate. Otherwise, the foreign carrier would be subsidizing other investors. Since the level of foreign ownership is below 100% for almost all foreign-affiliated carriers, this issue is not a real concern.

In addition, AT&T again offers no evidence that any "price squeeze" has actually occurred or that a foreign carrier is providing its U.S. affiliate with competitive advantages on affiliated routes. Indeed, TLD demonstrated in its Initial Comments that its market share is actually lower on its affiliated routes than on its non-affiliated international routes.[41/]

40/ AT&T Comments at 14-15.

41/ TLD Initial Comments at 41-43. Even assuming that the current safeguards were not adequate to prevent the three discriminatory abuses on affiliated routes, there (continued ...)

Finally, Professor MacAvoy's study demonstrates that AT&T, MCI and Sprint are enjoying price-cost margins of at least 70% and rising on most major international routes.[42/] Given these large and growing price-cost margins, there is no real danger of AT&T suffering from a "price squeeze."[43/]

IV. THE COMMISSION DOES NOT HAVE JURISDICTION TO IMPOSE A MARKET ACCESS TEST ON FOREIGN AFFILIATED CARRIERS

An even more fundamental reason not to adopt the proposed rule is that the Commission does not have jurisdiction over international telecommunications trade matters. This awkward fact is highlighted by the comments submitted on behalf of the

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41/ (... continued)

is no basis for applying a new entry test for unaffiliated routes. On unaffiliated routes, it is not possible for the foreign-affiliated carrier or its affiliated carrier in the home country to discriminate against competing U.S. carriers by giving them less than their proportionate share of return traffic, consigning them to inferior facilities or implementing an accounting rate "price squeeze." Accordingly, AT&T has offered no justification for application of any new rule to unaffiliated routes. See also id. at 63-65.

42/ MacAvoy Statement ¶ 57 (IMTS), ¶ 59 (International WATS).

43/ Furthermore, the Commission should not consider a foreign carrier's accounting rates as one of the general public interest factors under Section 214. The problem of above-cost accounting rates should not be tied to entry policies since there are significant accounting rate issues with many foreign correspondents that do not seek to enter the United States (including those partially owned by U.S. firms). In addition, Professor MacAvoy's study establishes that the three major U.S. carriers are using accounting rate reductions to increase their profit margins, not to reduce prices to consumers. See MacAvoy Statement ¶ 53 (settlement costs decreased by as much as 50% in some major countries between 1994 and 1994), ¶ 57 (discussing increasing price-cost margins). Instead of unilaterally introducing accounting rate issues into foreign-affiliated carrier entry matters, the Commission should continue working on a multilateral basis to address this problem in a comprehensive manner. The United States would have greater credibility if U.S. carriers passed along accounting rate reductions to consumers instead of pocketing the savings. Indeed, permitting open entry would be the best way to force U.S. carriers to reduce their profit-cost margins, and to pass future accounting rate reductions on to consumers.

Executive Branch by the National Telecommunications and Information Administration ("NTIA").

A. The Proposed Rule Cannot Survive the Executive Branch's Comments

While the Executive Branch clearly took pains to avoid direct criticism of the proposed rule, a careful analysis of its comments shows that its view of the Commission's authority is fatal to the proposed rule.

The Executive Branch acknowledges that the Commission has authority to regulate interstate and foreign carriers for the purpose of providing U.S. consumers with quality communications at reasonable prices.[44/] But even when the Commission is acting pursuant to this authority, the Executive Branch finds only limited scope for the Commission to consider the extent to which foreign telecommunications markets are open to competition.[45/] The Executive Branch insists that the Commission may consider the extent of foreign telecommunications competition only if the Commission accepts the "requirement for deference and coordination with the Executive Branch."[46/]

The Executive Branch finds this requirement in the Constitution. It expressly invokes "the constitutional principle of separation of powers, which prevents one branch of government from usurping the functions of another."[47/] These functions include "national security, foreign relations, the interpretation of international agreements, and trade (as well as direct investment as it relates to international trade policy)."[48/] In these fields, the Executive Branch declares, its responsibility is "primary."

44/ Executive Branch Comments at 10.

45/ Id. at 15.

46/ Id.

47/ Id. at 16 n. 23.

48/ Id. at 11, 14.

The Commission may exercise its authority in such fields only if it shows "great deference to the Executive Branch."[49/] (In addition, the Executive Branch lists some areas of overlapping jurisdiction -- "antitrust and telecommunications and information policy" -- where the Commission "must . . . take into account the Executive Branch's views and decisions").[50/] All this must be done, the Executive Branch declares, "to ensure consistency and promote U.S. interests in dealing with foreign nations and their telecommunications carriers" and to make sure that the Commission acts "in a manner consistent with U.S. international legal obligations, including MFN commitments."[51/]

What the Executive Branch does not do, however, is spell out the consequences of its position for the proposed rule. In practice, they are devastating. By invoking its constitutional primacy in trade negotiation and trade policy, the Executive Branch has deprived the Commission of authority to implement the proposed rule -- except at the instigation of the Executive Branch itself. The Executive Branch's authority to interpret U.S. trade law obligations provides a good example of how the principle of "great deference" will work. The Executive Branch has made clear that it and it alone has responsibility for ensuring that the Commission acts "in a manner consistent with U.S. international legal obligations, **including MFN obligations**."[52/] But a reciprocal-treatment rule of the sort the Commission has proposed for Section 214 is not consistent with the nation's MFN obligations, which require that all trading partners receive equal treatment.

In practice, this means that the Commission's proposed rule may only be applied only if, as, and when the Executive Branch says it may be applied. Whether to

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49/ Id. at 11; see also id. at 14.

50/ Id. at 11.

51/ Id.

52/ Id. (emphasis added).

apply -- or even publish as final -- a rule so plainly at variance with U.S. MFN obligations can only be a decision of the Executive Branch.

Even after publication, every application of the rule would continue to implicate trade policy and foreign relations. Thus, every time it applied the proposed rule, the Commission would be required to give "great deference" to the Executive Branch. Of course, there could only be one decisionmaker in the end, and "great deference" means that the decisionmaker will always be the Executive Branch. Indeed, given the sensitivity of applying a reciprocity-based rule, the Commission would quite likely receive Executive Branch guidance at every turn -- on whether attention should be given to a Section 214 application, on how fast the application should move, and on how the Commission's deliberations should come out. In short, as the Executive Branch makes clear, the Commission may adopt a trade-reciprocity policy only if it is willing to be a rubber stamp for the Executive Branch. Any sign of independence by the FCC from Executive Branch authority would violate the Constitution.

In 1988, when it last commented on the Commission's authority in this area, the Executive Branch was more blunt:

> authority to formulate and implement U.S. trade policy is properly the domain of the Executive Branch. Moreover, we continue to oppose any interpretation of the FCC's authority which would allow for independent regulatory action based on trade policy grounds. Rather, actions taken by the Commission must be predicated on its authority under the Communications Act and based upon communications policy grounds.[53/]

In 1995, the Executive Branch's language is more soothing, but in the end, when the Executive Branch speaks of receiving "great deference" in areas of "overlapping responsibilities," it means much the same thing as in 1988. Indeed, as if

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53/ Comments of National Telecommunications and Information Administration at 5 (May 20, 1988) (filed on behalf of the Executive Branch).

to lay to rest any doubts on that score, the most recent Executive Branch Comments cite its 1987 and 1988 comments with approval.[54] All that is different this time around is that the Executive Branch seems willing to let the Commission act in fields claimed by the Executive Branch -- as long as the Commission is plainly subordinated to the Executive Branch.

The Executive Branch's latest approach -- subordinating but not eliminating the Commission in areas of Executive Branch primacy -- does not ease the separation-of-powers problem created by the proposed rule. It would simply add a new dimension to the problem, for the Executive Branch's approach conflicts directly with Congress' intent that the FCC function as an independent agency. While agency independence is traditionally defined in terms of insulation from the Presidential removal power,[55] it is also hard to describe an agency as independent if its actions depend on Executive Branch approval.[56] In fact, involving the Executive Branch in Section 214 applications is likely to politicize what Congress intended to be an objective and consistent process removed from the ever-changing and often highly contentious realm of trade policy.

54/ Executive Branch Comments at 11 n.18.

55/ Humphrey's Ex'r v. United States, 295 U.S. 602, 629-30 (1935) (upholding limitations on the Executive's removal power over independent agency commissioners); Wiener v. United States, 357 U.S. 349, 356 (1958) (same).

56/ Lawrence H. Tribe, American Constitutional Law, 2d ed. 253 (1988) (citing Bowsher v. Synar, 478 U.S. 714, 762 (White, J., dissenting) ("Congress may deem it necessary and proper to insulate government officials from direct political influence by the White House does not imply derogation of the President's . . . duty to take Care that the Laws be faithfully executed, for any such duty is necessarily limited by the substantive and structural content of the laws Congress enacts.") (internal quotation marks omitted)).

B. "Coordination" With The Executive Branch Would Not Create Commission Jurisdiction Over International Telecommunications Trade Issues

In addition to the new problems it creates, the Executive Branch's proposal to subordinate the Commission fails to remedy the jurisdictional infirmities of the Commission's proposed market-access test. Creating a formal mechanism by which the Commission defers to the Executive Branch would not cure the proposal's most obvious flaw. It would still run counter to the statutory framework established by Congress to address telecommunications trade issues.

1. The Communications Act Does Not Authorize the FCC to Engage in Trade Policy

Section 152 limits the Commission's power to communications traffic "which originates and/or is received within the United States, and to all persons engaged within the United States in such communication. . . ."[57] The Commission's market-access test exceeds this authority by effectively seeking to regulate both foreign governments and their domestic telecommunications markets.

While the proposed rule facially applies to foreign carriers, its real object is the foreign governments that regulate or own those carriers. It is these foreign governments, not the foreign carriers, that must alter their regulatory structures in order to comply with the Commission's proposal to install the U.S. regulatory structure across the globe.[58] This transparent effort to influence the behavior of foreign governments simply is not permitted by Section 152, which clearly limits the Commission's jurisdiction to persons and activity operating within the United States.

This jurisdictional limit can no more be altered by the Executive Branch than by the FCC. While an agency is granted a significant amount of discretion in

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57/ Id. § 152.

58/ See Teleglobe Comments at 12-16 (rule requires a U.S.-style regulatory regime).

interpreting the statute under which it operates,[59] it is equally true that an agency cannot act in a fashion contrary to law;[60] nor can the Executive Branch authorize it to do so.

2. Congress Has Vested Authority For Telecommunications Trade Policy With The Executive Branch, Not The FCC

Similarly, the Executive Branch may not use "coordination" and "consultation" as the basis for delegating to the Commission authority granted by Congress to the Executive Branch. Congress expressly granted USTR the authority to address the problem of closed international telecommunications markets. The Telecommunications Trade Act of 1988 ("TTA")[61] sets out a comprehensive process for securing more open markets for U.S. telecommunications products and services.[62] This process requires USTR to investigate unfair telecommunications trade practices and authorizes it to negotiate agreements or impose trade sanctions (including reciprocity measures) to respond to such practices.[63]

Significantly, at the same time that the TTA vests telecommunications trade authority in USTR, it deliberately withholds such authority from the FCC.[64] Sections 3109(a) and 3110(a) of the TTA explicitly limit the FCC's role to data collection and to participation with USTR and Commerce in a telecommunications

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59/ Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

60/ Chevron, 467 U.S. at 842-43; Japan Whaling Ass'n v. American Cetacean Soc'y., 478 U.S. 221, 233 (1986); Earth Island Inst. v. Mosbacher, 929 F.2d 1449, 1451 (9th Cir. 1991).

61/ 19 U.S.C. §§ 3101-3111 (Supp. 1994).

62/ TLD Initial Comments at 11-12; Deutsche Telekom Comments at 19-22.

63/ TTA, 19 U.S.C. §§ 3103, 3104 & 3106.

64/ Deutsche Telekom Comments at 22.

competitiveness study.[65] This entirely ministerial role is confirmed by TTA's legislative history, which stresses that the "requirement that the FCC submit . . . certain data . . . should not be interpreted as suggesting that the FCC has any legal authority to formulate trade policy." [66]

The legislative history of the TTA also indicates that the proposed market access test conflicts with congressional intent in another significant way. This history indicates that Congress's principal objective was not to close the American market, but to open foreign markets -- and to do so through negotiation.[67] Congress reaffirmed this policy recently in the Uruguay Round Implementation Act, which states:

> [t]he principal negotiating objective of the United States in the extended negotiations on basic telecommunications services to be conducted under the auspices of the WTO is to obtain the opening on nondiscriminatory terms and conditions of foreign markets for basic telecommunications services through facilities-based competition or through the resale of services on existing networks.[68]

Thus, Congress has chosen to achieve a liberal international telecommunications market -- but by authorizing Executive Branch negotiation not by permitting the FCC to impose reciprocity requirements unilaterally under Section 214.

The conclusion just stated -- that Congress has not authorized the FCC to impose reciprocity requirements under Section 214 -- is supported by other statutory provisions. These provisions, specifically Sections 308(c) and 310(c) of the

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65/ TTA, 19 U.S.C. §§ 3109(a) & 3110(a).

66/ H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 659, reprinted in 1988 U.S.C.C.A.N. 1547, 1692; Deutsche Telekom Comments at 22.

67/ TTA, 19 U.S.C. § 3106(c); TLD Initial Comments at 11.

68/ Uruguay Round Agreements Act, Pub. L. No. 103-465, § 135, 108 Stat. 4840 (1994) (19 U.S.C. § 3555); Deutsche Telekom Comments at 17.

Communications Act and Section 35 of the Submarine Cable Licensing Act,[69/] expressly establish reciprocity requirements in particular instances. If Congress had wanted the FCC to consider such reciprocity requirements under Section 214, it would have said so equally clearly in that section. Indeed, that Congress enacted § 308(c), providing for imposition of reciprocity conditions under Title III in 1934, at the same time that it enacted Section 214, suggests even more strongly that it did not want reciprocity to be a factor under Title II. In sum, Congress has vested USTR, not the FCC, with the authority to open foreign telecommunications markets, and USTR alone has the ability to use reciprocity as leverage to do so.

The Executive Branch may not surrender this role to the Commission without asking Congress to rewrite the TTA, which vests all authority for telecommunications trade policy in USTR. Nor does USTR have authority to avoid the procedures of the TTA or Section 301 of the Trade Act of 1974 by altering the statutory mechanisms for opening telecommunications markets -- mechanisms which do not include imposing reciprocal access requirements under Section 214.

3. According "Great Deference" To The Executive Branch Would Violate The Administrative Procedure Act

The Executive Branch's requirement for "great deference" would create one additional insurmountable problem. According "great deference" to the Executive Branch amounts to a requirement that the FCC apply a rubber stamp to the Executive Branch position regardless of the other material in the record. This would violate the Administrative Procedure Act ("APA").

Commission decisions under Section 214 cannot be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[70/] The Commission

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69/ 47 U.S.C. §§ 34-38 (1988).

70/ ITT World Communications, Inc. v. FCC, 595 F.2d 897 (D.C. Cir. 1979); 5 U.S.C. § 706A.

must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[71/] More specifically, any Commission disposition of a Section 214 application would be arbitrary and capricious if the FCC has:

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[72/]

Agreeing in advance to apply a rubber stamp in the name of "great deference" to the Executive Branch would make it difficult for the Commission to comply with the APA. If the Commission agrees in advance to accord "great deference" to the Executive Branch by rubber stamping its decisions, it would not fully consider the positions and evidence advanced by the applicant and other interested parties. But if the Commission discounts or ignores the arguments made by other parties, it would violate the APA requirement to carefully consider all of the arguments and evidence in the record offered by all parties.[73/]

[71/] Communications Satellite Corp. v. FCC, 836 F.2d 623, 628 (D.C. Cir. 1988) (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

[72/] Id. at 628; Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983).

[73/] APA § 706 explicitly states "In making the foregoing determinations, the Court shall review the **whole** record" (emphasis supplied). The D.C. Circuit has implied that, in some instances, the arbitrary and capricious standard is not significantly different from the substantial evidence standard required by § 706(a)(2)(E). Ass'n of Data Processing Serv. Orgs., Inc. v. Board of Governors, 745 F.2d 677, 683-84 (D.C. Cir. 1984). Under this standard, a reviewing court cannot uphold an agency determination only by reference to portions of the record that support the agency. Rather, it must take account of evidence in the record which detracts from the evidence relied upon by the agency. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

In addition, if the Commission gave "great deference" to the Executive Branch, then its decisions on Section 214 applications would not be a product of Commission expertise, but of Executive Branch expertise. While this might be the desired result with respect to trade policy generally (which is, after all, the Executive Branch's responsibility), it is not with respect to decisions under Section 214.[74]

In short, Commission action under Section 214 must be a result of reasoned agency decision-making. By predicating its decisions on Executive Branch approval, the Commission will reach decisions which are neither reasoned, nor its own.

C. Other Parties Provide No Support For the Commission's Claim to Trade Jurisdiction

While a few parties claim that the Commission has jurisdiction to regulate international trade through its proposed market access test, they have not provided adequate support for their contentions. When examined carefully, the decisions cited by the proponents of the rule demonstrate that the FCC has consistently focused on the potential anticompetitive effects of the foreign carrier entry in the U.S. market, not on the actions of foreign governments and the potential effects that foreign market structures might have on the global telecommunications trade environment.

AT&T misreads the Commission's decision in <u>In the Matter of International Competitive Carrier Policies</u>.[75] In that proceeding, the Commission was concerned that a foreign carrier which originated traffic in the United States to its home country might deny competing U.S. carriers **operating agreements** to international traffic between the United States and its home country. Accordingly, the Commission said that it might condition a Section 214 authorization "on the granting of **operating**

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[74] Finally, as mentioned above, according "great deference" to the Executive Branch's trade policy would conflict squarely with the Congressional requirement that the Commission should not consider trade issues in the context of Section 214.

[75] 102 F.C.C. 2d 812 (1985) ("<u>ICCP</u>") (cited in AT&T Comments at 42.

agreements to additional U.S. carriers for a particular service and traffic path."[76] The FCC's principal concern was that a foreign-affiliated carrier would be in a position to discriminate against non-affiliated U.S. carriers seeking to serve the FAC's home country -- a concern well within its traditional jurisdiction -- not that foreign governments would preclude entry into their internal domestic markets -- a concern not within the Commission's jurisdiction. The Commission itself recognized this critical distinction when it stated: "We are not equipped, however, to consider the domestic markets of foreign countries."[77] Nothing in the intervening 10 years has equipped (or authorized) the FCC to do so.[78]

Similarly, while the Commission's international resale proceedings do look to the availability of reciprocal resale opportunities in foreign markets, they do so with an eye to preventing anticompetitive effects within the United States. The Commission, in In the Matter of Regulation of International Accounting Rates,[79] found that its goal in permitting interconnected private line resale -- to force downward pressure on accounting and U.S. calling rates -- would be jeopardized without equivalent resale opportunities at both ends. If resale were permitted on only a "one way" basis, then

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76/ ICCP, 102 F.C.C. 2d at 843 (emphasis supplied).

77/ Id. at 842 n. 75.

78/ Similarly, in In the Matter of Regulatory Policies and International Telecommunications, 4 FCC Rcd 7387 (1988), another decision relied on by AT&T, AT&T Comments at 42, the Commission's concern was that discriminatory treatment hampered the ability of small U.S. carriers to enter into operating agreements with foreign PTTs. AT&T's reliance on In the Matter of Regulation of International Common Carrier Serv., 7 FCC Rcd 7331 (1992), is also misplaced. While the Commission voiced support for its "goal of encouraging competitive entry in foreign markets," Id. at 7331 (cited by AT&T Comments at 42), this proceeding only involved the regulatory classification of a carrier with foreign affiliates that provided service from the United States to the affiliated country.

79/ International Resale Order, 7 FCC Rcd 559, amended, 7 FCC Rcd 7927 (1992).

"the already significant U.S. net settlements deficit would increase, ultimately increasing the burden on the U.S. ratepayers through, for example, higher rates." [80/]

Most recently, in In the Matter of AmericaTel Corporation,[81/] the Commission looked closely at the Chilean telecommunications market only to ensure that ENTEL-Chile would "not present a substantial risk of anticompetitive effects in the U.S. market for international telecommunications services."[82/] Indeed, the Commission specifically rejected AT&T's request to apply a comparable market access standard.[83/]

In sum, the FCC has never before exercised jurisdiction to regulate the home markets of foreign telecommunications carriers. Rather, it has only taken the limited steps necessary to permit U.S. carriers to originate service between the United States and a foreign carrier's home country free from anticompetitive influences. This practice is entirely consistent with the provisions of both the Communications Act and the TTA. However, the proposed reciprocity test goes far beyond these accepted jurisdictional parameters by raising broader trade concerns that are, in the Commission's own words, more "appropriately considered by other branches of government."[84/]

80/ Id. at 561. This policy was applied to grant applications in ACC Global Corp., 9 FCC Rcd 6240, 6246-49 (1994) and In re Applications of fONOROLA Corp. and EMI Communications Corp., 7 FCC Rcd 7312 (1992).

81/ 9 FCC Rcd 3993 (1994).

82/ Id. at 4001.

83/ Id. at 3995-96 ¶ 13.

84/ Foreign Ownership of CATV Sys., 77 F.C.C. 2d 73, 79 (1980) (rejecting reciprocity in cable TV investment limits).

V. THE PROPOSED MARKET ACCESS TEST WOULD INTERFERE WITH EXECUTIVE BRANCH INITIATIVES AND HARM U.S. INVESTMENTS ABROAD

Even if the Commission did have jurisdiction to impose the proposed market access test, its adoption should be rejected on the grounds that it is, quite simply, bad trade policy. As the comments of numerous parties point out, other countries are likely to perceive the Commission's market access test as a significant new trade barrier. Such an outcome can only have negative consequences. Not only would it interfere with the Executive Branch's bilateral and multilateral initiatives, but it also would lead other countries to retaliate, which in turn would damage both existing and prospective U.S. business interests abroad.

Comments submitted by U.S. and foreign interests alike emphasize the fear that foreign countries will view the proposed market access test as a major new trade barrier, despite the Commission's claim that such is not its intent. As the British Government stated in its comments: "[T]here is an inherent danger that market entry tests will be perceived as [a closing of the US markets], particularly if the hurdle is set unrealistically high or causes the administrative breakdown of the authorization procedure."[85/] The French DGPT too expressed its skepticism over the rule's import: "[t]here is the risk that the new rulemaking might be added to the current procedures, thus increasing the scope and the duration of inquiries. Any such increase would be perceived by France as the implementation of new barriers to the entry of foreign entities on the U.S. telecommunications markets, and would cause France serious concern."[86/]

85/ British Government Comments at ¶ 16.

86/ Comments from Directorate General of Posts and Telecommunications (France) at 2 (April 7, 1995) ("DGPT Comments").

These comments not only highlight the very real fear that other countries will view the Commission's test as a trade barrier, but also point to a significant reason for this result: increased administrative burdens. As many other parties point out as well, the rule will significantly increase the uncertainty, delay, and costs associated with Section 214 authorizations.[87/] This is because, as currently formulated, the test requires the "review and elaborate balancing of numerous additional factors and sub-factors that can only be undertaken on a case-by-case basis."[88/] With no weights assigned to any of the factors, and no timetables set for decisions, the rule appears to leave it entirely to the Commission's discretion as to whether or when a given application will be approved. In short, the test is as far from an objective, uniform standard as any test can possibly be. It is no wonder that foreign governments and foreign carriers will view it primarily as a means of impeding the latters' entry into the U.S. market.

Two consequences necessarily follow from other countries' consideration of the market access test. **First**, the United States may find itself at odds with its multilateral trading partners, who may view the Commission's unilateral reciprocity approach at best as uncooperative, and at worst as violative of U.S. commitments (such as the commitment not to erect any new trade barriers during the negotiations of the

87/ Teleglobe Comments at 20-22 (". . . [T]he modified market entry policies proposed in the Notice almost certainly would result in far more extensive case-by-case review of Section 214 international facilities applications, longer delays in processing such applications, and thus greater uncertainty in the market."); fONOROLA Comments at 16 ("The Commission would likely find it burdensome, time consuming and intrusive to investigate the entirety of a foreign telecommunications market. . . .); Deutsche Telekom Comments at 30-31 (finding that the effective market access test is a complicated two-step process that "contain[s] significant ambiguities"); France Telecom Comments at 8-10 (stating that the complicated nature of the effective market access test will create uncertainty for both U.S. and non-U.S. carriers); Korean Government Comments at 3 (the effective market access inquiry is likely to create "lengthy delays" in processing applications and additional reporting requirements); NYNEX Comments at 5 (stating that the modified standard "afford[s] the Commission wide latitude and discretion" in making its determination).

88/ Teleglobe Comments at 22.

GATS Telecom Annex). This is already happening. For example, Korea pointed out that "[t]hrough the addition of a new 'effective market access' inquiry to the Section 214 'public interest' test, the United States may violate the standstill requirement of the Ministerial Decision on Basic Telecommunications."[89/] For its part, the British Government pointed out a more fundamental conflict with the WTO. Specifically it stated that the Commission's approach "may be difficult to reconcile with the concept of national treatment under the WTO agreement, which requires signatories to treat foreign suppliers of a service in the same way as suppliers of the nationality of the country in question."[90/] Thus, adoption of the proposed rule would almost certainly disrupt the Administration's ongoing efforts both to negotiate a favorable multilateral trade agreement in the telecommunications sector, and to develop the Global Information Infrastructure.[91/] Further, adoption of the rule would provide other countries with a convenient basis to blame the United States if the trade negotiations fail in April 1996.

89/ Korean Government Comments at 3.

90/ British Government Comments at ¶ 17.

91/ See, e.g., also Korean Government Comments at 3 ("In light of the April 1996 deadline for conclusion of the NGBT, and the necessity for all participants to focus on the multilateral negotiations, the FCC proposals may undermine the multilateral discussions through the introduction of new controversial aspects"); Deutsche Telekom Comments at 13 ("The NPRM makes no mention of [the GATS standstill Agreement]. Nor does it explain how the Commission's proposed action can be reconciled with the letter or spirit of this commitment"); NYNEX Comments at 9 ("Adoption of the proposed effective market access test would effectively involve the Commission to a greater extent than in the past in delicate bilateral trade relationships, which in turn could affect multilateral negotiations"); Cable & Wireless Comments at 3 ("CWI urges the Commission not to act in isolation, but rather to assure that its regulatory policies complement traditional bilateral and multilateral negotiations. Otherwise, the effective market access determination could seriously interfere with such administration initiatives as the GII-related Agenda for Cooperation").

Second, other countries would likely retaliate directly against U.S. interests abroad.[92] As the Korean Government pointed out, "the result of the FCC's proposal could be an overall tightening of restrictions on global telecommunications market access, as other countries seek to emulate the U.S. model in order to protect their national telecommunications entities."[93] Similarly, the French DGPT explicitly stated it "will carefully analyse the effects of the proposed measures, if adopted, and will take this analysis into account when readjusting the French regulatory regime."[94]

As a result, U.S. companies seeking to invest abroad could be severely harmed by adoption of the proposed rule. Certainly U.S. companies that invest abroad, like NYNEX, are worried:

> Implementation of the proposed effective market access standard would create the risk that foreign administrations will retaliate by imposing new restrictions or retarding the removal of existing restrictions on U.S. entry and investment in their markets. This unintended result could adversely affect NYNEX's and other U.S. carriers' ability to invest abroad.[95]

92/ Deutsche Telekom Comments at 32 ("[t]he Commission's approach to leveraging open foreign markets is likely to be worse than ineffective: it may cause retrenchment and even retaliation by some foreign governments."); Comments of Secretary of Communications and Transportation of Mexico at 11 & 13 ("SCT Comments") ("Such a policy also has the potential to create incentives for other countries to withhold access to their markets. . . ."); Telex-Chile Comments at 3 ("To impose new, burdensome and needless regulatory hurdles on carriers from such countries is to invite retaliation and a reduction . . . in the competitiveness of markets."); NYNEX Comments at 5 (the Commission's flexible standard "may invite -- rather than resolve the concern about inviting retaliation").

93/ Korean Government Comments at 1.

94/ DGPT Comments at 2.

95/ NYNEX Comments at 5.

Even if other countries retaliate simply by imposing an identical market-access test on U.S. carriers, those carriers' investments would be threatened. As just discussed, the market-access test is a highly subjective, highly malleable standard under which any decision in a given case -- denying or granting authorization -- can be justified. Thus, the rule can be readily used to keep U.S. firms from entering or expanding in foreign markets. Again in the words of NYNEX:

> [T]he Commission's approach . . . afford[s] the Commission wide latitude and discretion in determining whether to allow a particular carrier to enter the U.S. international facilities-based services market . . . The Commission does not explain why other countries would be unlikely to give their regulatory authorities similar discretion to restrict U.S. carriers' access to their markets, or why such authorities would be unlikely to exercise this discretion, particularly since U.S. telecom market and investment policies generally still contain restrictions that impact foreign entrants.[96/]

Indeed, the proposed rule could readily be applied against U.S. companies because of their investments in third countries. For example, GTE has investments in countries like the Dominican Republic and Venezuela that do not permit new, foreign, international facilities-based entrants.

To risk such retaliation against U.S. carriers is both foolish and harmful. Given that U.S. firms already have more at stake abroad than their foreign competitors have within the United States, they will likely come away from any reciprocity battle considerably more bruised.

The magnitude of these problems is illustrated by Figure 2. This map shows the countries where U.S. carriers have investments in providers of

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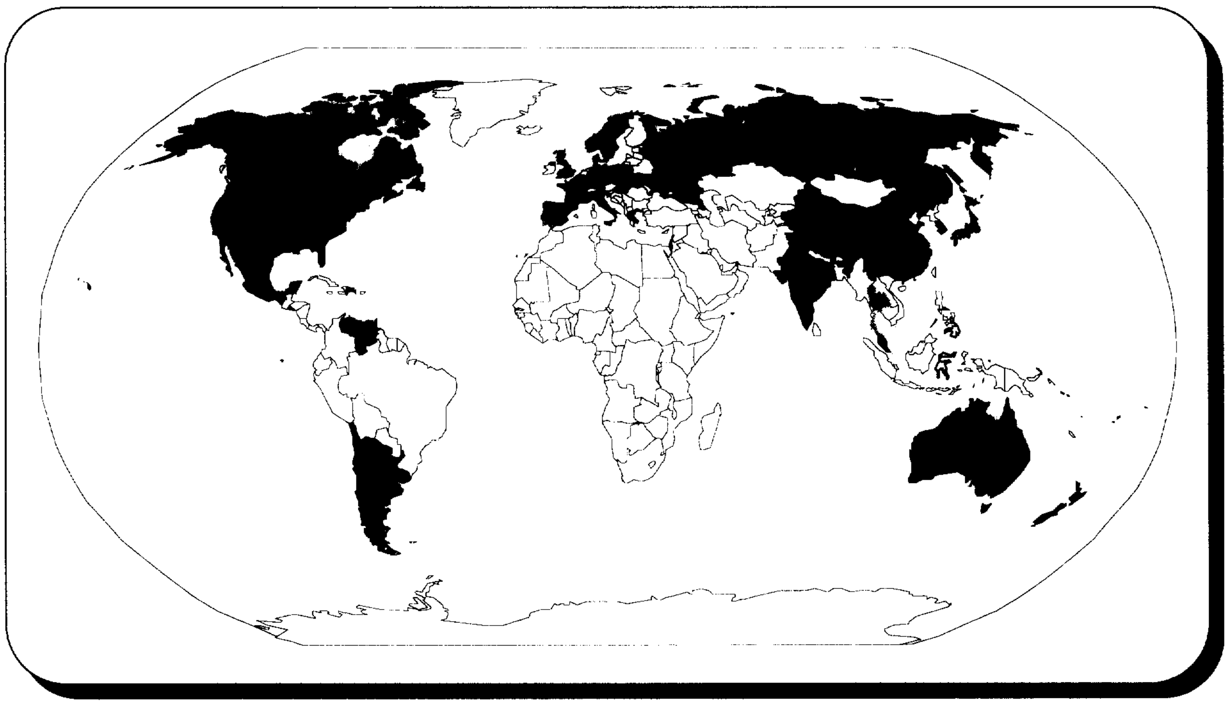
96/ Id. at 5-6 (footnotes omitted).

facilities-based international services in black,[97/] and the countries where U.S. carriers have investments in providers of other telecommunications services in gray.[98/]

FIGURE 2
COUNTRIES WHERE U.S. CARRIERS HAVE INVESTMENTS IN PROVIDERS OF TELECOMMUNICATIONS SERVICES



Quite clearly, U.S. carriers stand to lose more than their foreign competitors in any telecommunications trade war. The stakes are even higher when one considers that foreign countries may not limit their retaliation to international facilities-based services. Just as the USTR under Section 301 can respond to other

97/ Australia (BellSouth); Belize (MCI); Canada (AT&T, GTE); Chile (Southwestern Bell); Dominican Republic (GTE); Hungary (Ameritech); Japan (Airtouch); Mexico (MCI); New Zealand (Ameritech, Bell Atlantic); Ukraine (AT&T); and Venezuela (GTE, AT&T).

98/ Argentina (BellSouth, GTE); Belgium (AirTouch); China (BellSouth, GTE); Czech & Slovak Republics (US WEST); Denmark (BellSouth); France (Southwestern Bell); Germany (BellSouth, AirTouch); Greece (NYNEX); India (NYNEX); Israel (BellSouth, Southwestern Bell); Italy (Bell Atlantic); Malaysia (US WEST); Norway (Ameritech); Poland (Ameritech); Portugal (Airtouch); Russia (AirTouch, US WEST); South Korea (AirTouch); Spain (AirTouch); Sweden (AirTouch); Thailand (NYNEX); United Kingdom (NYNEX, U.S. West, Southwestern Bell); and Uruguay (BellSouth).

countries' unfair trade practices in one sector by imposing sanctions in a different sector, so too might other countries retaliate against adoption of any market access test by choosing to restrict U.S. firms' access to different telecommunications services and equipment markets. Should they choose to restrict access to markets, such as cellular services or equipment, where U.S. firms are already heavily engaged, the harm could be considerable.[99/] In short, the net result of the proposed rule could be to undermine U.S. global leadership in telecommunications and information services.

VI. THE NPRM WILL NOT LIBERALIZE FOREIGN MARKETS

Perhaps the risk of retaliation would be worth taking if the NPRM had a chance of producing global telecommunications liberalization. But the fact remains that the market-access test simply provides no credible incentives for either foreign countries or foreign carriers to liberalize any sooner than they are already planning to. Remarkably, none of the parties who support the rule offer any reason to believe that this rule will achieve its intended purpose. AT&T (citing C. Fred Bergsten) simply concludes that global telecommunications liberalization will be achieved where countries and carriers have an incentive to open markets, and that access to the U.S. market provides that incentive.[100/] However, neither AT&T nor Dr. Bergsten explain how the market-access test will provide access to the U.S. market. Nor do they explain how the test will encourage global liberalization. As TLD demonstrated in its Initial Comments, the reverse is true.

First, as discussed above, the administrative uncertainty that the test creates completely eliminates any ability for a foreign carrier to determine whether it will

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99/ U.S. telecommunications firms that have investments in cellular services abroad include NYNEX, Bell Atlantic, Ameritech, BellSouth, Southwestern Bell, AirTouch and GTE.

100/ AT&T Comments at 3 & 18 (citing Letter from C. Fred Bergsten to the Honorable Reed E. Hundt, dated January 18, 1995).

ever gain access to the U.S. market. This is because the test is at once too restrictive and too flexible: it demands foreign regulatory structures meet exhaustive, detailed criteria that the United States itself could conceivably fail, while at the same time leaving the Commission an unusual amount of discretion.[101/]

Second, even if the rule provided more certainty, it is unclear that the benefit offered -- access to the U.S. market -- is of sufficient value to induce foreign carriers to give up whatever monopoly or other benefits they may have at home. As with any competitive market, doing business in the United States will involve risk, and market penetration may be quite low. In contrast, regulatory barriers at home provide many foreign carriers with sizable, guaranteed returns and a high market share.[102/]

Dr. Bergsten's letter, on which AT&T relies, is most notable for what it does **not** say. Dr. Bergsten's letter simply articulates his concerns regarding asymmetrical market access and proposes a general solution: the United States should seek "to create conditions that open the foreign market . . . and ensure against price or technical discrimination against US carriers by providers that have gained *de facto* control over effective market access to that foreign country."[103/] This solution in no way endorses the unwieldy mechanics of the Commission's test. Indeed, as discussed above, the Commission's test is likely to be counterproductive to these goals.

Moreover, an examination of Dr. Bergsten's writings demonstrates more generally that the unilateral reciprocity approach taken by the FCC is one likely not to meet with success. As early as 1982, Dr. Bergsten warned against the foolishness of such an approach:

> The whole basis of the postwar trade liberalization has been to trade off concessions in one sector for concessions in

101/ TLD Initial Comments at 32.

102/ Id. at 33.

103/ Bergsten Letter at 2.

> another sector, reflecting the competitive abilities of different countries. If you go down to item-by-item reciprocity, then I think you'd have both a politically unfeasible world and one that did not make much sense in economic terms, either.[104/]

More recently, Dr. Bergsten stated:

> The administration must, however, get its trade policy back onto the primarily multilateral track that produced the spectacularly successful triple play (Uruguay Round, NAFTA, and APEC) of late 1993 . . .The extensive agenda of leftover issues from the Uruguay Round provides an excellent opportunity to launch new multilateral initiatives in the GATT.[105/]

These statements are hardly an endorsement of the tit-for-tat reciprocity found in the market access test. Rather, they show a decided preference for approaching global trade issues on a multilateral basis. Even further, they suggest what a recent Institute for International Economic study concluded: that "aggressive unilateralism" could seriously undermine the multilateral trading system.[106/] Such a result is more likely than not to hinder liberalization than to promote it.[107/]

[104/] C. Fred Bergsten, *Enact New Laws to Bar Imports? NO--That would "risk triggering retaliatory actions by other countries,"* U.S. News & World Report, July 19, 1982 p. 53.

[105/] C. Fred Bergsten, Letter to the Editor, Foreign Affairs, 175 (Sept.-Oct. 1994).

[106/] *IIE Report Urges Administration Not to Use Super 301 Trade Weapon*, International Trade Reporter, 1452 (Sept. 21, 1994). Dr. Bergsten is the Director of the Institute for International Economics.

[107/] Similarly, the Economic Strategy Institute's paper submitted in this proceeding provides no evidence, or even argument, that the proposed rule would succeed in opening up foreign markets any sooner than they otherwise would.